MALAYAN BANKING BHD.

v.

THE INTERNATIONAL TIN COUNCIL & ANOR. & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
AJAIB SINGH SCJ
[SUPREME COURT, CIVIL APPEAL NO. 29 & 30 OF 1987]
26 AUGUST 1989

CIVIL PROCEDURE: *Service - Jurisdiction - Whether s. 23(1)(b) of the Courts of Judicature Act 1964 provides the High Court with extra territorial jurisdiction to serve notice of concurrent writ where overseas foreigners are sued as co-defendants with local residents.*

In these two appeals, the ITC and DKS were sued as co-defendants by Malaysian bankers. The issue in these two appeals is whether the learned Judge of the High Court was correct in law in setting aside the order of the Registrar granting the appellants leave to serve out of jurisdiction, a notice of concurrent writ of summons on the International Tin Council (ITC) in London. The learned Judge instead made an order giving the appellants liberty to amend their statement of claim to exclude that part of the prayers relating to their monetary claim against the ITC and conditional upon the said amendment, liberty be given to them to cause a fresh concurrent writ of summons to issue against the ITC in London or elsewhere in the United Kingdom. In setting aside the Registrar's order, the learned Judge came to the conclusion that in Malaysia, the jurisdiction of the High Court is restricted to those upon whom its process may be served within the territorial jurisdiction of the Courts except under O. 11 of the Rules of the High Court 1980. The learned Judge rejected the argument that s. 23(1)(b) of the Courts of Judicature Act 1964 creates another exception to the general rule, on the ground that Datuk Keramat Smelting Sdn. Bhd. (DKS) being one of the several defendants in both cases has its place of business within the local jurisdiction.

Held:

[1] Apart from O. 11 r. 1 of the Rules of the High Court 1980, s. 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where oversea foreigners are sued as co-defendants with local residents. In construing an Act of Parliament where the words used by the legislature are precise and unambiguous, the literal and strict construction rules should apply. Parliament here intends to confer on the High Court an extra-territorial jurisdiction in cases where more than one defendant is being sued, so long as one of the several defendants resides or has his place of business within Malaysia.

[2] On the facts there is no dispute that DKS has a place of business within the local jurisdiction of the High Court and that they are one of the several defendants in both the cases under appeal. Accordingly the Registrar was correct in law in granting the order that he did.

[Appeal allowed.]

Cases referred to:

Maclaine Watson & Company Ltd. v. Department of Trade [1988] 3 WLR 1033
In re International Tin Council [1988] 3 WLR 1159
Siskina (Cargo Owners) v. Distos SA [1979] EC 200

Re Rusfield [1886] (32) Ch D 123
Johnson v. Taylor Bros. & Co. Ltd. [1920] AC 144
United Malayan Banking Corporation Bhd. v. Soo Lean Tooi & Ors. [1984] 1 MLJ 47
Salomon case [1897] AC 22
AG v. Great Eastern Railway Company [1879-80] 5 AC 473
Evan v. Bartlam [1937] AC 473

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1), (1)(b)
Courts Ordinance 1948, s. 47
Rules of the High Court 1980, O. 11 r. 1
Courts of Judicature Act [Sing], s. 16(1)(b)

For the appellants - Vinayak Pradhan (Nitin Nadkarni with him); M/s. Skrine & Co.
For the respondents - J.A. Yeoh; M/s. Shearn Delamore & Co. & Drew & Napier)

JUDGMENT

Mohd. Azmi SCJ:

The question for determination in both these appeals is whether the learned Judge of the High Court was correct in law in setting aside the order of the Registrar dated 27 June 1986 granting the appellants leave to serve out of jurisdiction, a notice of concurrent writ of summons on the International Tin Council (ITC) in London. Instead the learned Judge made an order giving the appellants liberty to amend their statements of claim to exclude that part of the prayers relating to their monetary claim against the ITC, and conditional upon the said amendment, liberty be given to them to cause a fresh concurrent writ of summons to issue against the ITC in London or elsewhere in the United Kingdom. The substituted order was couched in such terms because he was of the view that unlike the other prayers sought in the writ, the High Court had no jurisdiction over the monetary claim against the ITC although surprisingly no order was deemed necessary to amend the pleadings relating to this particular cause of action.

It is common ground that the ITC is recognised under English Law by the International Tin Council (Immunities and Privileges) Order 1972. [See *Maclaine Watson & Company Ltd. v. Department of Trade* [1988] 2 WLR 1033]. Because of its immunity, the organization is not subject to the jurisdiction of the English Courts except in respect of the enforcement of arbitration awards. [See *In re. International Tin Council* [1988] 3 WLR 1159]. There is no dispute however that the ITC has no such immunity in Malaysia.

In each of these two appeals, the ITC and Datuk Keramat Smelting Sdn. Bhd. (DKS) are being sued as co-defendants by Malaysian bankers who at all material times are carrying on business at their branches in Kuala Lumpur, Penang, London and elsewhere. In SCCA no. 29 of 1987, Malayan Banking Berhad prays *inter alia* for the sum of 35 million pounds against ITC on a loan transaction effected in London, (references in this judgment are in British pound sterling) they also claim damages against DKS, and as against both ITC and DKS, there is common prayer for a declaration that the plaintiff banks are entitled to sell the tin metal malaysia comprised in DKS tin warrants given to them by ITC as pledges to secure the London credit facilities. In SCCA no. 30 of 1987 the same orders are being prayed for by Bank Bumiputra Malaysia Berhad against both the defendants, except that the sum alleged to be due from ITC on the loan facilities granted by their London Branch, is approximately 76 million pounds. It is an undisputed fact that ITC enjoys and has not waived its immunity

from being sued in England, and unlike DKS, it does not reside or has its place of business in Malaysia. According to the statements of claim. DKS has refused to deal with the pledged tin stored in Penang as directed by the appellants, in accordance with the pledge agreement.

Before us, there is no cross-appeal by ITC or DKS against the substituted order made by the learned Judge on 13 January 1987.

In setting aside the Registrar's order, the learned Judge came to the conclusion that in Malaysia, the jurisdiction of the High court is restricted to those upon whom its process may be served within the territorial jurisdiction of the Courts, and to this general rule the only exception is to be found in O. 11 Rules of the High Court 1980. This conclusion is based on such English authorities as *Siskina (Cargo Owners) v. Distos SA* [1979] EC 200, 254 F, and *Re Rusfield* [1886] (32) Ch D 123. The learned Judge rejected the arguments that s. 23(1)(b) of the Courts of Judicature Act 1964 creates another exception to the general rule on extra-territorial jurisdiction of our Courts.

Basing his conclusion on the cause of action and prayers sought in the statements of claim, the learned Judge held that the monetary claim was outside the purview of O. 11 r. 1 Rules of the High Court 1980, but the declaratory order sought against the ITC and DKS relating to the pledged tin fell under sub paragraph (j) or (k) of the said order, and therefore the High Court had jurisdiction to exercise the extra territorial jurisdiction to serve the notice of writ in England, either on the ground that the ITC was "a necessary or proper party" to the pledge claim, or on the ground that the tin pledged by ITC as security for the loan facility was situated within jurisdiction. The learned Judge, however ruled that the monetary claim that did not fall under any of the sub-paragraphs of O. 11 r. 1. The relevant parts of sub paragraphs (j) and (k) of O. 11 r. 1 provide:

> ... service of notice of writ out for the jurisdiction is permissible with the leave of the Court in the following cases, that is to say:
>
> (j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;
>
> (k) if the action begun by the writ is either by a charge of property situated within the jurisdiction (other than immovable property) and seeks the sale of the property, the foreclosure of the charge or delivery by the chargor of possession of the property but not an order for payment of any moneys due under the charge or by a chargor of property situate (other than immovable property) and seeks redemption of the charge, reconveyance of the property or delivery by the chargee of possession of the property but not a personal judgment;

Before us, various points have been raised in arguments by Mr. Pradhan on behalf of the appellants, but we need only concern ourselves with whether the learned Judge was correct in holding that s. 23(1) of Judicature Act 1964 had no legal effect whatsoever other than to embody the principle based on English Law that the jurisdiction of the Malaysian High Courts is territorial. The main bone of contention of Mr. Pradhan is that sub-paragraph (b) of s. 23(1) provides another exception to the general principle and confers extra territorial jurisdiction on the High Court, on the ground that DKS being one of the several defendants in both cases admittedly has its place of business within the local jurisdiction.

We shall now consider s. 23(1) of the Courts of Judicature Act 1964 which provides:

> (1) Subject to the limitations contained in Art. 128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where:

(a) the cause of action arose, or

(b) the defendant or one of several defendants resides or has his place of business, or

(c) the facts on which the proceedings are based exist or are alleged to have occurred, or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court ...

Section 23(1) appears to be the successor of s. 47 read with the Second Schedule of the Courts Ordinance 1948. Paragraph 1 of the Second Schedules provides that, '... Jurisdiction and authority of the High Court in this country is of a like nature and extent as are exercised by the Chancery and King's Bench Divisions of the High Court of Justice in England." With the repeal in 1964 of s. 47 and the Second Schedule of 1948 Ordinance by the Courts of Judicature Act, the civil jurisdiction of the High court is now governed by s. 23. Although s. 23 refers to Art. 128 of the Federal Constitution, for the purpose of the present appeals, there is no necessity to deal with the constitutional provision because Art. 128 merely sets out the jurisdiction of the Supreme Court to which the provision of s. 23 must of necessity be subject to. We have been reminded that under English law, jurisdiction of the Court is based on presence within the jurisdiction, and there is no equivalent statutory provision in England as our s. 23(1)(b). Thus in *Johnson v. Taylor Bros. & Co. Ltd.* [1920] AC 144, Viscount Haldane at p. 153 said:

> Order XI, r. 1, does not lay down in imperative terms a new principle of law as to be applicable in all cases. What it does is, while leaving intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction, to enable the Court to give special leave for service out of the jurisdiction in certain circumstances.

In the same case Lord Dunedin also opined:

> I think it is legitimate to begin by considering the genesis of the rule. I understand that jurisdiction according to English law is based on the act of personal service and that if this is effected the English Law does not feel bound by the Roman maxim "*Actor sequitur forum rei*". It is far otherwise in other systems where service is in no sense a foundation of jurisdiction, but merely a *sine qua non* before effective action is allowed.

In our view, service is not solely the foundation of jurisdiction of our High Courts. Apart from O. 11 r. 1, s. 23(1)(b) of the Courts of Judicature Act 1964 provides extra territorial jurisdiction to the High Court is cases where oversea foreigners are sued as co-defendants with local residents. Our attention has been drawn to the case of *United Malayan Banking Corporation Bhd. v. Soo Lean Tooi & Ors.* [1984] 1 MLJ 47 where the late Yusuf Abdul Rashid J, had expressed the following opinion on s. 23(1)(b):

> In my opinion it is the intention of the Legislature to confer jurisdiction in the High Court of Malaysia under s. 23(1)(b) of the Act 91 on a person who does not reside or has no place of business or has no property within the local jurisdiction of the said High Court if such person is one of several defendants who have sued where the other defendants are residing or have a place of business or have property within the local jurisdiction of the said High Court. Section 23(1) of Act 91 would not have been worded so, had the intention of the Legislature been different. Should the words "one of several defendants" been omitted, then the High Court would not have jurisdiction on a person who is one of several defendants and who does not reside within the local jurisdiction thereof even if the other defendants are residing therein. Since the provisions of s. 23(1)(b) of Act 91 are in *pari materia* with the provisions of s. 16(1)(b) of the Singapore Act, the latter provisions should admit the same construction.

In interpreting s. 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt here that Parliament intends to confer on the High Court extra territorial jurisdiction in cases where more than one defendants are being sued, so long as one of the several defendants resides or has his place of business within Malaysia. As stated by Lord Halsbury LC in *Salomon* case [1879] AC 22 at 29, the Court has "no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the Act itself." The provision of s. 23(1)(a) does not impose any condition relating to cause of action or the nature of the prayers being sought before the High Court can assume jurisdiction. In our opinion, the learned Judge erred in law in refusing to give any meaningful interpretation to the statutory provision by concluding that it was a mere restatement of the principle underlying O. 11 r. 1 Rules of the High Court based on English Law. As stated by Lord Selborne, LC in *AG v. Great Eastern Railway Company* [1879-80] 5 AC 473 at 479, "It would, however, be contrary to sound principle to imply such a condition, not expressed in the clause, if the words, as they stand would be sensible and operative without it." Indeed, Lord Russell, in *Evans v. Bartlam* [1937] AC 473 at 481 ruled that, "It would be adding a limitation which the rule does not impose or re-writing of the section which Parliament had failed to do so." By imposing a requirement that the money claim should not be tagged on the appellants' claim for the declaratory orders, the learned Judge had in our view erred in law by imposing non-existent condition to the operation of s. 23(1)(b).

In the circumstances, the only relevant issue to be determined in both these cases is whether DKS, in one of several defendants who has a place of business within the local jurisdiction of the High Court. If so, then the High Court shall have the necessary jurisdiction not only over DKS but also over the co-defendant ITC, notwithstanding that the latter is not within the jurisdiction. On the facts, there is no dispute that DKS has a place of business within the local jurisdiction of the High Court and that they are one of the several defendants in both cases under appeal. The Registrar was accordingly correct in law in granting the order that he did, and in the result, these two appeals should in our opinion, succeed. We are also in agreement with Mr. Pradhan that in the event of the ITC having been wrongly joined as a co-defendant, there is nothing to stop them from applying for both the actions to be struck off for misjoinder of parties.

For reasons discussed, we order that both the appeals be allowed with costs here and in the Courts below. The order of the Registrar is accordingly restored. Finally we order that the deposit be refunded to the appellants.

Also found at [1989] 2 CLJ 961